

ISSUED SEPTEMBER 11, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
OF THE STATE OF CALIFORNIA

MOHAMED ALI ASUMAIRI and	)	AB-6935
FATIMA N. MOHAMED)	
dba F & M Market	)	File: 20-240373
503 North H Street	)	Reg: 97039176
Tulare, California 93274,)	
Appellants/Licensees,	)	Administrative Law Judge
	)	at the Dept. Hearing:
v.	)	Jeevan S. Ahuja
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	June 3, 1998
	)	Sacramento, CA
)	

Mohamed Ali Asumairi and Fatima N. Mohamed, doing business as F & M Market (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which revoked their off-sale beer and wine license for appellant Mohamed Ali Asumairi, on two occasions, and appellants' clerk, Khalid Asumairi, on one occasion, having purchased cigarettes from a Department investigator after having been told they were stolen, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22,

¹The decision of the Department, dated August 7, 1997, is set forth in the appendix.

arising from conduct violative of Business and Professions Code §24200, subdivision (a), and Penal Code §§664/496.

Appearances on appeal include appellants Mohamed Ali Asumairi and Fatima N. Mohamed, appearing through their counsel Harold Williams and Howard L. Porter, and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas M. Allen.

FACTS AND PROCEDURAL HISTORY

The Department instituted an accusation against appellants charging that, on two occasions in June 1996, appellant Mohamed Ali Asumairi bought Marlboro cigarettes believing they had been stolen, and that appellants' clerk, Khalid Asumairi, did so on one occasion in September, 1996. Appellants have been licensed since December 1, 1989, without having previously been disciplined.

An administrative hearing was held on June 10, 1997, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Department investigator Blake Graham regarding his version of the circumstances of the three transactions, and by appellants Asumairi and Mohamed regarding their version of the events.

Subsequent to the hearing, the Department issued its decision which determined that appellant Asumairi and his clerk, Khalid Asumairi, had made the purchases from Graham as alleged, after having been informed the cigarettes had been stolen.

Appellants thereafter filed a timely notice of appeal. In their appeal,

appellants raise the following issues: (1) the Department of Alcoholic Beverage Control has no authority to revoke a license where criminal charges of attempting to receive stolen property are pending but there has not yet been a conviction; and (2) the offense of attempting to receive stolen property is not contrary to the public and welfare and morals within the meaning of Business and Professions Code §24200. These contentions are, to a degree, interrelated, and will be discussed together.

DISCUSSION

Appellants contend that the Department has no authority to revoke their license for the offense of attempting to receive stolen property where there has been no criminal conviction, and, further, that the offense of attempting to receive stolen property does not constitute conduct contrary to the public welfare and morals within the meaning of Business and Professions Code §24200, subdivision (a).

Appellants challenge what they describe as the Department's "unique way to go about getting a revocation" (App. Br., p.5) by proceeding against appellants prior to the conclusion of the criminal proceedings. Appellant suggests, citing Kirby v. Alcoholic Beverage Control Appeals Board (1969) 3 Cal.App.3d 209 [83 Cal.Rptr. 89], that were appellants to plead nolo contendere to the criminal charges, the Department could not revoke their license.

Kirby does not support appellant's contention. While it is true that Kirby held that a plea of nolo contendere was not "a plea, judgment or verdict of guilty"

within the then language of Business and Professions Code §24200, subdivision (d),² it nevertheless upheld the Department's contention that there was substantial evidence in the record "independent of the criminal court proceeding" sufficient to support a finding of a violation of Penal Code §496. (See Kirby, supra, 3 Cal.App.3d at 217.) This holding explains why the Kirby court reversed the decision of the Appeals Board even though the Appeals Board had also ruled that the Department was not entitled to rely on the plea of nolo contendere.

Appellants have not challenged the factual determinations made by the Administrative Law Judge (ALJ). The testimony of investigator Graham describing the three transactions involving the "stolen" cigarettes is clearly sufficient to constitute substantial evidence in support of the ALJ's findings.

That the offense is contrary to the public welfare and morals is also beyond dispute. Moral turpitude is a term susceptible to broad interpretation. It has been defined to embrace:

"any crime or misconduct committed without excuse, or any 'dishonest or immoral' act not necessarily a crime. [Citation.] The definition depends on the state of public morals and may vary according to the community or the times, as well as on the degree of public harm produced by the act in question. [Citation.] Its purpose as a legislative standard is not punishment, but protection of the public. [Citation.] ... Moral turpitude has also been defined in criminal cases involving the use of prior convictions for impeachment purposes. Crimes which reveal a defendant's dishonesty, general 'readiness to do evil,' bad character or moral depravity involve moral turpitude."

² In 1978, the Legislature amended the section to add a plea of nolo contendere to a charge of a public offense as a ground for suspension or revocation.

(Clerici v. Department of Motor Vehicles (1990) 224 Cal.App.3d 1016, 1027-1028 [274 Cal.Rptr.230].)

In Rice v. Alcoholic Beverage Control Appeals Board (1979) 89 Cal.App.3d 30 [152 Cal.Rptr.285], the court observed that “moral turpitude is inherent in crimes involving fraudulent intent, intentional dishonesty for purposes of personal gain or other corrupt purpose ...”

The Appeals Board has routinely affirmed the Department’s imposition of discipline, usually revocation, in instances where licensees have been found to have attempted to purchase “stolen” cigarettes. This case is no different.

CONCLUSION

The decision of the Department is affirmed.³

RAY T. BLAIR, JR., CHAIRMAN
JOHN B. TSU, MEMBER
BEN DAVIDIAN, MEMBER
ALCOHOLIC BEVERAGE

³This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.